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No. 105

In the Supreme Court of the United States

OCTOBER TERM, 1943

SHIMYU NOBO AND SHIMYU M. GOLD, PETITIONERS

vs.  
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1945

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No. 105

SHINYU NORO AND SHOIE M. GOTO, PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 143-148) is reported at 148 F. 2d 696.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals affirming the District Court's judgments of conviction and sentence was entered on April 24, 1945 (R. 148), and a petition for rehearing was denied on May 17, 1945 (R. 154). The petition for a writ of certiorari was filed on June 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

On December 8, 1941, after Congress had declared war on Japan as the result of her attack on Pearl Harbor, customs agents of the Treasury Department, acting on instructions of the Secretary of the Treasury, and accompanied by an agent of the Federal Bureau of Investigation, took possession of the Nikko Inn, a restaurant in St. Petersburg, Florida, which the Government claims was operated by a partnership comprising the petitioners and another. The petitioners were Japanese enemy aliens. The agents found in the Inn books and records which the Government contends showed the income of petitioner Noro from the restaurant for a period of years. The petitioners were indicted and tried before a jury for criminal violations of the internal revenue laws. At the trial the Government introduced the books and records found in the Inn to prove their guilt. The jury found the petitioners guilty as charged, and judgments of conviction and sentence were entered by the District Court and affirmed on appeal to the Circuit Court of Appeals. The following questions are presented:

1. Whether possession of the books and records was lawfully obtained in the exercise of war powers of the Congress and the Executive.

2. Whether, if the Government lawfully came into possession of the books and records, it could properly use them to prove criminal violations of the internal revenue laws.

3. Whether the admission of the books and records at the trial constituted compulsion upon the petitioners to be witnesses against themselves in violation of the Fifth Amendment to the Constitution.

4. Whether the trial court committed reversible error in ruling on questions of the sufficiency and competence of evidence.

**CONSTITUTION, STATUTES, AND OTHER AUTHORITIES  
INVOLVED**

The pertinent provisions are set forth in a printed Appendix to the Government's brief in the Circuit Court of Appeals, hereinafter cited as Appendix, which we are filing under separate cover and to which we respectfully refer the Court.

**STATEMENT**

An indictment was returned in the United States District Court for the Southern District of Florida charging, in five counts, that petitioner Noro had wilfully attempted to evade and defeat income taxes relating to each of the calendar years 1936, 1937, 1938, 1939, and 1940; and that Goto and another, one Taniguchi, had aided and abetted the commission of Noro's alleged crimes. (R. 1-17.) Noro, Goto and Taniguchi were

charged in one other count with conspiring to evade and defeat the income taxes of Noro relating to the same years, in that, as partners or employees of the Nikko Inn, they had maintained a false set of books and records for the Inn and filed income tax returns in accordance therewith, and had concealed the true income of the partnership and Noro in a set of books written in the Japanese language. (R. 18-22.)<sup>1</sup>

Noro and Goto pleaded not guilty upon arraignment, and were tried before a jury after the granting of a motion by the Government for a severance as to Taniguchi. (R. 22.) Neither took the stand in his own defense.

At the trial, counsel for the petitioners admitted for the purpose of the record, at the request of the Government, that they "were alien enemies and not naturalized citizens; that they were subjects of the Japanese Government and not Americans." (R. 54.)

At about 5:30 P. M. of December 8, 1941, federal customs agents, acting under instructions issued by the Secretary of the Treasury, and accompanied by an agent of the Federal Bureau of Investigation, took possession of the Nikko Inn, a restau-

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<sup>1</sup> Section 145 (b) of the Revenue Acts of 1936 and 1938, and of the Internal Revenue Code (Appendix, p. 1), provides for the punishment of willful attempts to evade income tax; Sections 37 and 332 of the Criminal Code (Appendix, pp. 1-2) provide, respectively, for punishment of the crimes of aiding and abetting, and of conspiring.



rant in St. Petersburg, Florida. (R. 36-41, Appendix, pp. 20-21.) The federal agents were accompanied by a detail of five local policemen, as a measure of precaution against actions inimical to the Government or to the persons in the Inn. (R. 41.) The local policemen were posted outside the Inn as guards to keep away a crowd, and did not assist in examining the Inn. (R. 47, 48-49.)

Watson, the customs agent who directed the party, entered the Inn and asked for the proprietor. (R. 41.) Noro appeared and, in response to a question by Watson, answered that he was the proprietor. (R. 41.) Watson informed Noro that the Government was taking possession of the Inn and its contents until "some policy is determined as to what shall be done with alien enemies." (R. 41-42.) Watson asked Noro for the books of the company, and Noro showed him where they were. (R. 42, 49.) The premises were searched for "books and documents, etc., and for explosives and anything that might be inimical to the interests of the United States". (R. 48.)

There were found on the premises of the Inn \$16,609.22 in currency, most of it secreted in various places (R. 42-45); checks, notes and orders having a total face value of \$14,869; and also some Government securities (R. 44). Noro also disclosed that he had some \$8,000 in cash in a safety deposit box in one bank, and an account of \$18,000 in another. (R. 44.)

At about midnight of December 8, 1941 (R. 46, 47), Watson left the Nikko Inn with the money found there, under guard of the local policemen (R. 48). Because he feared that the safe of the Police Department at St. Petersburg might not be "safe", the money found in the Inn was deposited in a safe-deposit box in a local bank. (R. 47.)

Customs agents stayed at the Inn overnight and during the next day to guard the place and take inventory of the physical assets. (R. 48.) On the evening of the next day the federal agents took from the Inn five or six boxes of books and records. (R. 49-51.) A day or two later these documents were deposited intact and without any change in the vault of the Customs House at Tampa, Florida, for safekeeping. (R. 49-52.) There an officer of the Customs Agency Service "went through them very carefully looking for any indication of more assets of the Nikko Inn or any indication that they had been engaged in any subversive activities and finally turned certain of the books and records over to Mr. Rohrer of the Internal Revenue" (R. 53), on December 18, 1941 (R. 81), without making any change in them. (R. 53.)

Included in the books found in the Inn was a set of books of account with headings and dates in English characters, and Arabic numerals (Govt. Ex. 9-12; R. 53, 57), covering the calendar

years 1937, 1938, 1939 and 1940 (R. 57-58). These set forth in detail daily disbursements for items such as food, supplies, wages, and small salaries paid to Noro and Goto (R. 78, 91); and also set forth daily, monthly and annual totals of disbursements and receipts (R. 59-66, 70-71).

The income tax returns of Noro for each of the calendar years 1936, 1937, 1938, 1939 and 1940 (Govt. Ex. 1-5) were introduced into evidence (R. 32, 69). The returns for the years covered by the English books showed that Noro had returned as partnership income approximately one-third of the excess of the receipts over disbursements shown by those books. (R. 74-76.)

Properly authenticated certified copies of the income tax returns of Goto for the same years (Govt. Ex. 38, 40, 41 and 45) were put in evidence (R. 93-94), and showed that Goto had similarly returned his income according to the English books (R. 74, 95, 105).

The English books according to which the petitioners returned their shares of the partnership income, were, however, false. A set of books with dates and other explanatory data written in Japanese found in the Inn covered the years 1936, 1937, 1938, 1939 and 1940. (Gov. Ex. 14, 15; R. 56, 57, 60.) With respect to the latter four years, these books were in substance the same as the English books (R. 66, 71, 76), except that they showed much greater amounts of daily,

monthly, and annual receipts (R. 60-66, 70-77). The larger amounts of receipts shown by this set of books were confirmed, as to the greater part of the period involved, by sales books (Govt. Ex. 16-32), kept with English headings and dates (R. 57, 58, 71).

With respect to the year 1936, which was not covered by the English books of accounts (R. 58), the Government's witness Rohrer, a licensed certified public accountant (R. 68), testified from his examination and study of the Japanese books (R. 69) and the sales books (R. 71) that Noro had greatly understated his 1936 income in his return (R. 72-73). Rohrer could read Japanese (R. 78); he had had experience in working out codes in that language (R. 70-71); and he had employed the assistance of Japanese dictionaries and of a person fluent in the use of the Japanese language, who was also a witness at the trial (R. 59-68), to confirm the accuracy of his reading of the Japanese characters in the books (R. 66-71).

At the time possession was taken of the books and records of the Nikko Inn, Noro stated that he owned half of its property; that Goto and Mrs. Taniguchi each owned a one-fourth interest; and that this had been the arrangement since the spring of 1941. (R. 45.) This statement was later verified by Goto and Mrs. Taniguchi. (R. 45.) Copies of conveyances introduced into evidence (Govt. Ex. 46-48; R. 100-101) showed that

Noro's half interest had been conveyed to him before the tax years involved.

Goto was present when the customs agents took possession of the Inn (R. 46), and took an active part in arranging the affairs of the Inn after possession had been taken (R. 50). Part of the money taken from the Inn was deposited to his account. (R. 48.)

Boss, the chief of the Income Tax Division at Jacksonville, Florida (R. 101, 106), testified that his records failed to show that any partnership returns were filed for the Nikko Inn in St. Petersburg for any of the years from 1936 to 1940, inclusive (R. 107).

After a charge by the court (R. 114) to which no error is assigned, the jury found both defendants guilty as charged in the indictment (R. 134). Judgments of conviction and sentence followed, and were affirmed on appeal to the court below. (R. 148, 154.)

#### ARGUMENT

The facts presented by this case appear to be unique, since no other instances are known in which records of an enemy-owned establishment have been used in evidence in a criminal case after their seizure under similar circumstances. We think it is clear, nevertheless, that the action which was taken on December 8 and 9, 1941, affecting the Nikko Inn and its records, was within the authority conferred upon the President

by the Trading with the Enemy Act and by him delegated to the Secretary of the Treasury pursuant to that Act. To remove any possible doubt, Congress in the First War Powers Act, adopted December 18, 1941, ratified all such previous actions of the Secretary. It follows that the use of the records of the Nikko Inn as evidence in a later criminal prosecution presents no violation of constitutional right. No important question of federal law, calling for adjudication by this Court, is presented. There is no conflict with the decision of another Circuit Court of Appeals. We submit, therefore, that no basis exists for the issuance of a writ of certiorari.

# I

Section 5 (b) of the Trading with the Enemy Act of October 6, 1917 as amended by the Joint Resolution of May 7, 1940 (Appendix, pp. 4-5), conferred the following authority, among other powers, upon the President:

During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, \* \* \* transfers of credit between or payments by or to banking institutions as defined by the President \* \* \* and any transfer, \* \* \* or dealing in, any

evidence of indebtedness or evidences of ownership of property in which any foreign state or a national \* \* \* thereof, as defined by the President, has any interest, by any person within the United States \* \* \*; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed.

On June 14, 1941, pursuant to the foregoing authority, and "by virtue of all other authority" vested in him and "by virtue of the existence of a period of unlimited national emergency" the President issued Executive Order No. 8785 (Appendix, pp. 9-17) which revised Executive Order No. 8389 of April 10, 1940 (Appendix, pp. 5-9) and was made applicable on the same day to China and Japan and the nationals of those countries,<sup>2</sup> to include, among others, the following provisions:

<sup>2</sup> Executive Order No. 8389 was expressly ratified by Section 2 of the Joint Resolution of May 7, 1940, which amended the Trading with the Enemy Act. That Order imposed so-called "foreign funds" and property controls with respect to the property and transactions of Norway and Denmark and the nationals of those countries. Executive Order No. 8785 enlarged these controls and made them applicable to a list

SEC. 4. A. \* \* \* and the Secretary of the Treasury and/or the Attorney General may, through any agency, investigate any such transaction or act [referred to in Section 5 (b) of the act of October 6, 1917, as amended], or any violation of the provisions of this Order.

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses [to foreign countries or their nationals to engage in transactions] may be granted \* \* \*.

Before possession was taken of the property of the Nikko Inn on December 8, 1941 the "unlimited emergency" which had given rise to Executive Order No. 8785 had become war between the United States and Japan, recognized and declared by joint resolution of Congress earlier on the same day (Appendix, pp. 21-22). The Secretary of the Treasury was confronted with a situation in which thousands of enemy-owned businesses, of great potential value to the enemy and danger to the United States, were still in the hands of their own-

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of countries. Executive Order No. 8832 of July 26, 1941 (Appendix, p. 18) extended the same controls to China and Japan.



ers by virtue of general licenses which had previously been issued to the owners.<sup>3</sup> To cope with this situation, after revoking the previous licenses,<sup>4</sup> he issued telegraphic instructions on December 7, 1941 to the presidents of all Federal Reserve Banks (Appendix, p. 20)<sup>5</sup> to install Treasury Department representatives immediately in all "blocked" Japanese banking and business enterprises and to prevent access by any persons to the premises of such enterprises and the alteration, destruction or removal of the books and records of such enterprises. On December 8 his agents issued specific telegraphic instructions with reference to the property of Nikko Inn, here involved (Appendix, p. 21).<sup>6</sup> These measures, in company with others, effected temporary physical custody of all Japanese property and records, in order to determine the manner of their use, ascertain whether violations of restrictions had occurred, and allow time for further measures to be taken.<sup>7</sup>

<sup>3</sup> General License No. 68 of July 26, 1941, Appendix, pp. 18-19, licensed nationals of Japan who had resided only in the United States at all times since June 17, 1940 to engage generally in transactions.

<sup>4</sup> See Public Circular No. 8 of the Secretary of the Treasury, Appendix, p. 19.

<sup>5</sup> While the telegrams of the Secretary and the Acting Secretary set forth in the Appendix were not put in evidence, they are subject to judicial notice. *Bowles v. United States*, 319 U. S. 33, rehearing denied, 319 U. S. 785.

<sup>6</sup> See preceding footnote.

<sup>7</sup> As soon as the situation had been clarified as a result of investigation pursuant to the previous instructions, "frozen"

It seems clear from the wording of the Trading with the Enemy Act and the Executive Orders issued pursuant to it, in relation to the war situation which resulted from the attack upon Pearl Harbor, that the Secretary of the Treasury acted wholly within his authority in directing the temporary seizure of possession of Japanese owned enterprises. He had authority to investigate all of the transactions of these enterprises and to prohibit further transactions and dealings in their property by their owners. National security clearly demanded that the Secretary exercise this authority to the fullest extent.\* He was not confined to attempts to procure and execute search warrants in order to carry out his duty. The statutory power to "investigate, regulate, or prohibit" had become a war power, implemented by specific presidential authorization to the Secretary to investigate and to prescribe instructions to carry out the purposes of the authorized controls. Executive action was warranted and the means of making it effective had been provided.

enterprises were, so far as practicable, restored to Japanese nationals within the United States by General License No. 38A of December 15, 1941, 6 Fed. Reg. 6454.

\* It is not necessary to review here the nature of the emergency or the other measures which were taken to meet it. See *Hirabayashi v. United States*, 320 U. S. 81, 92-95; *Korematsu v. United States*, 323 U. S. 214, 218-219; *Bowles v. Willingham*, 321 U. S. 503, 520-521. As to the arrest of numbers of enemy aliens by executive action see Annual Report of the Attorney General of the United States (1942), pp. 14-15; Hoover, Alien Enemy Control, 29 Iowa L. Rev. 396, 400-403.

Even if it be assumed that the Secretary might have obtained the aid of judicial processes in scrutinizing enemy-owned businesses, pursuant to the somewhat general provision of Section 17 of the Trading with the Enemy Act, 40 Stat. 425, 50 U. S. C. App. § 17, he was not required to do so. Authority for judicial implementation of war powers does not exclude the more normal and effective use of the Executive's own authority. Such has been the holding from the beginning under the Alien Enemy Act of 1798, which authorizes the President to restrain, remove, or otherwise determine the disposition of natives, citizens, denizens, or subjects of hostile nations. R. S. § 4067, as amended, 50 U. S. C. § 21 (Appendix, p. 25). Notwithstanding a provision of the Act (R. S. § 4069, 50 U. S. C. § 23 (Appendix, p. 26) which requires the courts, upon complaint, to enforce presidential proclamations requiring the restraint or removal of an enemy alien, the President or an officer of the Executive Branch acting on his behalf may take summary action. *Lockington v. Smith*, 1 Pet. C. C. 466 (1817); *De Lacey v. United States*, 249 Fed. 625 (C. C. A. 9th); *United States v. Longo*, 46 F. Supp. 170 (D. C. Conn.). Similarly under Section 7 (c) of the Trading with the Enemy Act, this Court held that the President or his authorized agent, notwithstanding the remedies provided in Section 17, might directly demand the surrender of

enemy-owned property and that such a demand created an immediate duty to turn over the property. *Central Trust Co. v. Garvan*, 254 U. S. 554, 566-568. The authority to proceed by executive action under Section 5 (b) is no less clear.

It is true that the Secretary of the Treasury did not specifically authorize in advance the removal of the books and records of the Nikko Inn which is involved in this case. There can be no question, however, that he ratified it afterward, since the books were kept by his Department and used by it in developing the present case against the proprietors of the Inn for income tax violation. In any event, the agents placed in charge were told to "control the premises, property, etc." of the Inn. (Telegram of the Acting Secretary of the Treasury, Appendix, p. 20.) When they assumed charge, they were confronted with the suspicious circumstances of a large amount of secreted cash (see *supra*, p. 5) and with the necessity of removing it for safe keeping and of accounting for it. The inspection and removal of the books were as proper an incident to the discharge of their duty as the search of premises without a warrant and the seizure of contraband, including books of account, *Marron v. United States*, 275 U. S. 192, 199, which properly may accompany an arrest. *Agnello v. United States*, 269 U. S. 20, 30. Petitioner Noro cooperated in every way (R. 45).

A restrained use of the war power is here involved. As compared with the arrest and deportation of enemy aliens which the Alien Enemy Act authorizes and the confiscation of their property which this Court has declared to be within the Constitution, *United States v. MacIntosh*, 283 U. S. 605, 622; *United States v. Chemical Foundation*, 272 U. S. 1, 11, the temporary occupation of Nikko Inn and the seizure and inspection of its records are mild indeed. More drastic measures would not have exceeded the Secretary's authority.<sup>9</sup> We submit that the books of the Inn came lawfully into his possession.

The First War Powers Act, moreover, which was adopted eleven days after Pearl Harbor to clarify and enlarge the powers of the Government to deal with the emergency, provided expressly for the seizure of books and records such as took place in this case instead of leaving that power to inference from the authority to control transactions and to investigate, and ratified the actions already taken by the Secretary of the Treasury. Section 301 (Appendix, pp. 22-24)

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<sup>9</sup> We do not make the contention, attributed to the Government by the opinion below (R. 145-146), that enemy aliens do not come within the protection of the Fourth and Fifth Amendments, but have based our argument upon the premise that they do. The contrary impression of the court must have stemmed from misunderstanding of something said during oral argument. Although constitutional protection to enemy aliens is necessarily conditioned by time and circumstance, we assume it includes basic procedural safeguards.

amended Section 5 (b) of the Trading with the Enemy Act to empower the President, if necessary to the national security or defense, to require "through any agency that he may designate, or otherwise," by means of "instructions, licenses, or otherwise," the "seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of \* \* \* [any] person." Section 302 (Appendix, pp. 24-25) states that—

All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading with the Enemy Act \* \* \* which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

Language could hardly express more clearly the purpose to place beyond all doubt the legislative authority for measures such as those taken in this case; and this is borne out by the legislative history of the Act. See S. Rep. No. 911, 77th Cong., 1st Sess., p. 2; H. Rep. No. 1507, 77th Cong., 1st Sess., pp. 2-3; statement of Congressman Hancock, 87 Cong. Rec., Part 9, p. 9862.

That the Government may ratify unauthorized acts done in its behalf is, of course, well settled. *Tiaco v. Forbes*, 228 U. S. 549; *Swayne & Hoyt*,

*Ltd. v. United States*, 300 U. S. 297. It would be of no consequence if the ratification were regarded as having retroactive effect, since the taking of possession was in no way punishment for crime, cf. *Wong Wing v. United States*, 163 U. S. 228, and the prohibition of *ex post facto* laws in Article 1, Section 9 of the Constitution applies only to laws imposing criminal punishment. *Johannessen v. United States*, 225 U. S. 227. Moreover, a law enacted after the commission of a crime, making admissible evidence of the crime which was inadmissible at the time of its commission, is not an *ex post facto* law. *Hopt v. Utah*, 110 U. S. 574; *Thompson v. Missouri*, 171 U. S. 380.

## II

Possession of the books and records having been obtained lawfully, the Government's use of them comes within the principle enunciated in *Gouled v. United States*, 255 U. S. 298, at 311-312, that papers so obtained may be used "to prove any crime \* \* \* as to which they constituted relevant evidence." See also *Milam v. United States*, 296 Fed. 629 (C. C. A. 4th), certiorari denied, 265 U. S. 586, approved in *Carroll v. United States*, 267 U. S. 132, at 159; *Johnson v. United States*, 228 U. S. 457; *United States v. Bookbinder*, 278 Fed. 216, 281 Fed. 206 (E. D. Pa.), affirmed 287 Fed. 790 (C. C. A. 3d), certiorari denied, 262 U. S. 748; *Benton v. United States*, 70 F. 2d 24 (C. C. A. 4th), certiorari denied, 292 U. S. 642.

The use made of the books in the present case, accordingly, does not present a question requiring decision by this Court.

### III

Introduction of the books and records in evidence did not constitute a violation of the mandate of the Fifth Amendment (Appendix pp. 3-4) that "No person \* \* \* shall be compelled in any Criminal Case to be a witness against himself \* \* \*." The present case is sharply distinguishable from cases such as *Boyd v. United States*, 116 U. S. 616, involving the use of process to require a defendant to produce private documents. It is universally recognized that such process is within the prohibition of the Fifth Amendment, since the person might be required to swear to the authenticity or origin of the articles produced. See 8 Wigmore, Evidence (3d ed. 1940), Sec. 2264. The present case, however, involves no effort to require the petitioners to be witnesses in any capacity; authentication of the books and records was by other means detailed below. Since there was no compulsion upon the petitioners to testify, and the records were lawfully obtained, the Fifth Amendment is not infringed. *Adams v. New York*, 192 U. S. 585, 597-598; *Johnson v. United States*, *supra*; *Schenck v. United States*, 249 U. S. 47; 8 Wigmore, *supra*, Sec. 2264; cf. *Holt v. United States*, 218 U. S. 245; *Marron v. United States*, 275 U. S. 192. As



Mr. Justice Holmes said in *Johnson v. United States*, *supra*, p. 458: "A party is privileged from producing the evidence but not from its production."

#### IV

The jury's verdict of guilty finds ample support in the evidence. Books and records produced by Noro as the books of the Nikko Inn at the time the customs agents took possession (R. 42, 49) were introduced into evidence at the trial in unaltered condition (R. 49, 53). The petitioners admitted in their brief below (p. 26) that these books and records "were in 1941 the property and in the custody of the defendants Noro and Goto." They had unmistakable reference to the business of the Inn and to Noro's income from it. (R. 62-66, 74-78, 91.) In the circumstances, the authenticity of the books and records is beyond question.

For each of the years 1937, 1938, 1939, and 1940, Noro returned as income substantially one-third of the profits of the Inn as shown by the English books of the Inn. (R. 74-76.) From this it should have been plain to the jury that Noro had received as income at least one-third of the profits of the Inn for each of the years involved. The Japanese books covering the same period contained the same entries as the English books, except that they showed much larger receipts and profits (R. 60-66, 70-77). The Japanese books were confirmed, as to the greater part

of the period involved, by the daily sales slips (R. 58, 71). The jury thus had ample grounds for concluding that the English books were deliberately falsified as a means of attempted tax evasion. Cf. *Spies v. United States*, 317 U. S. 492, 499. The Government was of course not required to prove the exact amount of unreported income. *United States v. Johnson*, 319 U. S. 503, 517, rehearing denied, 320 U. S. 808.

The petitioners suggest (Br. 23) that Taniguchi falsified the English books to defraud his partners. This view was not so much as suggested at the trial, and is patently implausible. Had Taniguchi acted to defraud Noro, he would hardly have kept records disclosing the alleged fraud as plainly as did the Japanese books and the daily sales slips. Moreover, the records show that recognition was given Taniguchi's proprietary interest upon his return to Japan (R. 67); and his wife apparently succeeded to his interest (R. 45).

It is true that there were no English books of account for the year 1936, but it clearly appeared that with respect to that year, as well as to the later years involved, Noro grossly understated his income in his income tax return. (R. 72-73, 75.)<sup>10</sup>

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<sup>10</sup> There can be no valid objection to the testimony of Rohrer, a licensed certified public accountant (R. 68), as to the results of his examination and studies of the books and records. He testified without contradiction that he could read Japanese (R. 78), that he had had experience in working

We submit, therefore, that the jury had ample grounds for concluding that Noro had wilfully attempted to evade and defeat income taxes for the years involved. The evidence was also sufficient to sustain Goto's conviction, for by returning his income upon the same false basis as Noro employed (R. 74, 95, 105), he assisted Noro in the perpetration of his crime. The jury was therefore justified in finding that Goto had aided and abetted Noro and conspired with him.<sup>11</sup>

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out codes in that language, and that he had employed the assistance of Japanese dictionaries and of a person fluent in the use of the Japanese language (R. 70-71), who testified as a witness at the trial (R. 59-68), to confirm the accuracy of his reading of the Japanese characters in the books. The propriety of permitting a qualified accountant to testify as to the results of his examination of complicated books of account is well settled. *United States v. Johnson*, 319 U. S. 503.

<sup>11</sup> The judgment, which was one of guilt of both offenses (R. 24-25), must be sustained if it is valid either under the aiding and abetting counts or the conspiracy count. *Whitfield v. Ohio*, 297 U. S. 431; *Hirabayashi v. United States*, *supra*, p. 105.

## CONCLUSION

The decision below is correct. It creates no conflict and presents no question of importance calling for review by this Court. The petition should therefore be denied.

Respectfully submitted.

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JULY 1945.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1945

NO. 101

(33)

CONSTITUTION, STATUTES, AND OTHER AUTHORITIES  
INVOLVED,

Filed with Brief for the United States  
in Opposition

In the United States Circuit Court of Appeals  
for the Fifth Circuit

SERGEANT V. UNITED STATES, M. C. No. 101, 1945

United States of America, Plaintiff

BY APPOINTMENT OF THE COURT, THE FOLLOWING  
COUNSEL HAS BEEN ASSIGNED TO REPRESENT THE UNITED STATES

WATKINS ON THE PART OF THE UNITED STATES



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